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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

POLICE OFFICER CRAIG BUONORA

*Petitioner,*

*v.*

DARRYL T. COGGINS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit's creation of an "extra-judicial conspiracy exception" to the *Briscoe* rule of absolute immunity conflicts with the controlling decision of the United States Supreme Court?

2. Where each of the other seven (7) Circuit Courts of Appeals to consider this issue has rejected the Second Circuit's "extra-judicial conspiracy exception" and has held that witnesses are entitled to absolute immunity under 42 U.S.C. §§ 1981 and 1983 both from their testimony and from any conspiracy to commit perjury, does Rule 10 (a) of the Rules of the United States Supreme Court demonstrate that there are compelling reasons for granting this Writ?

3. Is Petitioner Police Officer Craig Buonora entitled to resolution of the absolute immunity question at the earliest possible stage in litigation?

4. Did the District Court err as a matter of law in determining the Petitioner's motion for summary judgment was premature and that the Respondent's Affidavits complied with Rule 56 (f)? Was the Circuit Court required to consider these issues *de novo*?

## List of Parties

DARRYL T. COGGINS, Plaintiff and Respondent;

Police Officer CRAIG BUONORA, Defendant and Petitioner;

COUNTY OF NASSAU, Defendant;

NASSAU COUNTY POLICE DEPARTMENT, Defendant;

Police Officer JAMES VARA, Defendant;

JOHN DOES 1-10, Defendants.

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## OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Eastern District of New York (Joseph F. Bianco, J.) dated June 20, 2008, denying Petitioner's motion for summary judgment is reported at *Coggins v. County of Nassau*, 2008 WL 2522501 (E.D.N.Y.), and reprinted at App. 5a-43a.[1]

The Summary Order of the United States Court of Appeals for the Second Circuit, filed January 28, 2010, is reported at *Coggins v. Buonora*, 362 Fed.Appx. 224, 2010 WL 308990 (2nd Cir. 2010). It is reprinted at App. 1a-4a.

The Order of the Second Circuit denying rehearing and rehearing *en banc*, filed May 19, 2010, is unreported and reprinted at App. 44a-45a.

## JURISDICTION

On August 27, 2007, Respondent brought suit against Petitioner and other Defendants in the United States District Court for the Eastern District of New York, alleging that a grand jury indicted him on charges of which he was innocent. Respondent also alleged that the defendants -- including Buonora -- knew he was innocent but nevertheless encouraged his prosecution. More relevantly herein, the complaint further alleged that Officer Buonora committed perjury and that Officers Vara and

[1] References preceded by "App." and followed by "a" are to the pages of the Appendix filed and served herewith.

Buonora conspired to commit perjury during the grand jury proceedings.

On June 20, 2008, the Honorable Joseph F. Bianco, Judge, United States District Court for the Eastern District of New York, denied Petitioner's motion for summary judgment. (App. 5a-43a.) On July 1, 2009, Petitioner appealed the denial of summary judgment to the United States Court of Appeals for the Second Circuit

On January 28, 2010, the Second Circuit issued a Summary Order affirming the District Court's Order in part and dismissing the appeal in part. (App. 1a-4a.)

On May 19, 2010, the Second Circuit issued an Order denying Petitioner's petition for a panel rehearing or for rehearing *en banc*. (App. 44a-45a.)

The jurisdiction of this Court to review the Orders of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

**42 U.S.C. § 1981**
Equal rights under the law

**42 U.S.C. § 1983**
Civil action for deprivation of rights

**Federal Rules of Civil Procedure**
Rule 8. General Rules of Pleading

**Federal Rules of Civil Procedure**
Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

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Rule 56. Summary Judgment

**Local Rules of the United States District Court for the Southern and Eastern Districts of New York**
Civil Rule 56.1

## CONCISE STATEMENT OF THE CASE

### A. Facts Giving Rise To This Case

Respondent Darryl T. Coggins was pulled over by Nassau County Police Officer James Vara on October 9, 2004, at approximately 4:30 A.M. Vara radioed for assistance. Petitioner Police Officer Craig Buonora arrived at approximately 4:40 A.M., after Vara had administered a field sobriety test.

Coggins subsequently fled the scene on foot. Vara and Buonora gave chase. Buonora returned to the scene of the stop where a Floral Park Officer had remained with the two occupants of Coggins' vehicle. A loaded .380 magazine was found next to the vehicle's front passenger door. Vara was unable to catch Coggins. At approximately 5:00 A.M, a Floral Park Officer advised that he had located a loaded 9mm pistol in the vicinity of a fence that Coggins had jumped over while being chased. Buonora was ordered to sign off duty at approximately 7:40 A.M.

Coggins later appeared at the Nassau County, New York, 3rd Precinct with his attorney and surrendered.

Following Coggins' arraignment, the matter was presented to a Grand Jury. Buonora testified falsely before the Grand Jury that he had located the pistol and secured it until he was relieved by a Floral Park Officer. Coggins was indicted. Thereafter, the case was dismissed during the course of evidentiary hearings when Buonora's false testimony came to

light. Buonora pled guilty to, and was convicted of, perjury as a Class A misdemeanor.

Other than assisting at the scene of the arrest, Petitioner's sole involvement in the prosecution of Respondent was his testimony before a Grand Jury on March 17, 2005.

All of the facts related to the arrest and prosecution of Coggins and the fact that Buonora could not have been a "complaining witness" as a matter of law are contained in admissible records maintained by the Nassau County Police Department and were offered on Petitioner's motion to dismiss and for summary judgment.

## B. The District Court Proceedings

This case was brought August 27, 2007, by Respondent Darryl T. Coggins against the County of Nassau, the Nassau County Police Department, Police Officer James Vara, in his individual and official capacity, Petitioner Police Officer Craig Buonora, in his individual and official capacity, and John Does 1-10, in their individual and official capacity (collectively, "defendants"), pursuant to 42 U.S.C. §§ 1981 and 1983 as well as New York State tort law.

Respondent's complaint alleged that a grand jury indicted him on charges of which he was innocent. Respondent also alleged therein that the defendants -- including Buonora -- knew he was innocent but nevertheless encouraged his

prosecution. More relevantly herein, the complaint further alleged that Officers Vara and Buonora conspired to commit perjury during the grand jury proceedings.

On or about January 24, 2008, Petitioner moved for summary judgment. Petitioner argued that he was entitled to absolute witness immunity from suit; that four of plaintiff's causes of action were time-barred under New York State law; that Coggins failed to state a claim for negligence under New York State law; and that Coggins failed to plead special damages with sufficient specificity. The motion was denied in part and granted in part.

The District Court denied the motion as to Petitioner's claim of absolute immunity. Petitioner based his claim of absolute immunity on this Court's holding in *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), in which this Court established that all witnesses in judicial proceedings, including police officers, are absolutely immune from civil liability pursuant to the provisions of 42 U.S.C. §§ 1981 and 1983.

The District Court denied Petitioner's claim of absolute liability by relying on *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246, 254 (2d Cir.1984), *cert. denied* 470 U.S. 1035, 105 S.Ct. 1408, 84 L.Ed.2d 797 (1985), in which the Second Circuit created an exception to the *Briscoe* rule for extra-judicial conspiracies, which was extended to police officer defendants in *Dory v. Ryan*, 25 F.3d 81, 84 (2d Cir.1994). (App. 27a-29a.)

### C. The Appellate Court Proceedings

Petitioner appealed the District Court Order, arguing that the Second Circuit's exception for extra-judicial conspiracies was contrary to the holding in *Briscoe* and that the Second Circuit's "extra-judicial conspiracy exception" to absolute immunity was contrary to the holdings of all seven (7) of the other Circuit Courts that addressed the issue.

A three judge panel of the Second Circuit concluding that it was "bound by" *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246, 254 (2nd Cir.1984), cert. denied 470 U.S. 1035, 105 S.Ct. 1408, 84 L.Ed.2d 797 (1985), and *Dory v. Ryan*, 25 F.3d 81, 84 (2nd Cir.1994), affirmed the lower court's denial of absolute immunity at this stage of the proceeding. (App. 3a.) Additionally, the panel having concluded that "[a]bsent a more developed record of undisputed facts", it was "unable to determine as a matter of law that Buonora was not a complaining witness", and accordingly, the court lacked jurisdiction to consider that issue, requiring dismissal of that portion of the appeal. (App. 3a.)

The Petitioner subsequently petitioned the Second Circuit for a rehearing or rehearing *en banc*. That petition was denied on May 19, 2010. (App. 45a.)

## REASONS WHY CERTIORARI SHOULD BE GRANTED

The two prior panel decisions of the United States Court of Appeals for the Second Circuit, *San*

*Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246 (2nd Cir. 1984), *cert. denied* 470 U.S. 1035 (1985) and *Dory v. Ryan*, 25 F.3d 81 (2nd Cir. 1994), conflict with the decision of this Court in *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). Consideration, therefore, by this Court is compelling and necessary to maintain uniformity of the Court's decisions among the lower courts.

Moreover, this proceeding involves a question of compelling importance in that the Second Circuit's decisions in *San Filippo, supra*, and *Dory, supra*, creating an "extra-judicial conspiracy" exception to *Briscoe*, conflict with the authoritative decisions of each of the other seven (7) Circuit Courts of Appeals that have addressed this issue.

Finally, the panel of the Second Circuit which heard our appeal overlooked or misapprehended our motion to dismiss and summary judgment application and erroneously concluded, that absent a more developed record of undisputed facts, it was unable to determine as a matter of law that Buonora was not a complaining witness. (App. 3a.)

I.

## THE SECOND CIRCUIT'S CREATION OF AN "EXTRA-JUDICIAL CONSPIRACY EXCEPTION" TO THE *BRISCOE* RULE OF ABSOLUTE IMMUNITY CONFLICTS WITH THE CONTROLLING DECISION OF THE UNITED STATES SUPREME COURT AND, THEREFORE, COMPELLING REASONS EXIST TO GRANT THIS PETITION.

This lawsuit is an attempt by Coggins to gain financially from his alleged criminal behavior due to the fact that the criminal proceedings against him were dismissed when it was discovered that Police Officer Craig Buonora had testified falsely as to who had discovered a handgun found at the location where Coggins had fled police during the course of a field sobriety test.[2] The complaint is predicated on allegations of civil rights violations, conspiracy and New York State intentional torts.

Police Officer Craig Buonora was not a "complaining witness" and therefore is entitled to absolute immunity from civil damages, as well as from suit. *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)(holding that an officer acting as a "complaining witness" is not entitled to the *Briscoe* grant of absolute immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d

[2] Significantly, there is no dispute that whether Buonora located the gun or whether a Floral Park, New York, police officer located the 9mm weapon, it was found at that place and time.

411 (1985)(holding that immunity from suit is more than a mere defense to liability, "it is effectively lost if a case is erroneously permitted to go to trial"); *Pearson v. Callahan*, 555 U.S. ---, 129 S.Ct. 808, 816, 172 L.Ed.2d 565 (January 21, 2009)(where this Court restated, "'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.' *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam)*.").

In *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983), Justice Stevens, writing the opinion of the Court, specifically noted that at common law all persons who were integral parts of the judicial process were "provided absolute immunity from subsequent damages liability." *Id.* at 335. The *Briscoe* decision dealt specifically with the question of whether a police officer who testified falsely at trial could be held liable for damages under 42 U.S.C. § 1983.

The plaintiff in *Briscoe* argued that the Supreme Court should not grant absolute immunity to a police officer who commits perjury. The Court rejected the argument and refused to create such a narrow exception. "A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions... and may be prosecuted subsequently for perjury." *Id.* at 342. The Court recognized that, "[s]ubjecting... police officers to damages liability under § 1983 for their testimony might undermine not only their contribution to the

judicial process but also the effective performance of their other public duties." *Id.* at 345.

In denying Officer Buonora's motion to dismiss pursuant to FRCP 12(b)(6) and his motion for summary judgment pursuant to FRCP 56, the District Court below relied, in part, upon the Second Circuit's holdings in *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246 (2nd Cir. 1984), *cert. denied* 470 U.S. 1035 (1985) and *Dory v. Ryan*, 25 F.3d 81 (2nd Cir. 1994). (App. 27a-29a.)

The Second Circuit in *San Filippo* extended the *Briscoe* grant of immunity to witnesses testifying in a Grand Jury proceeding. The Court, however, created an "extra-judicial conspiracy exception" to this absolute immunity. 737 F.2d at 255. Subsequently, in *Dory*, the Court held that the "extra-judicial conspiracy exception" applies to police officer witnesses. 25 F.3d at 84.

In *Dory*, 25 F.3d 81 at 84, a panel of the Second Circuit, relying upon its prior holding in *San Filippo*, held that "*Briscoe v. LaHue, supra*, was expressly limited to immunity for testimony given in judicial proceedings, and its rationale -- to encourage witnesses to come forward with all they know -- does not justify extending that immunity to cover extra-judicial conspiracies between witnesses and the prosecutor to give false testimony." In denying the motions below, the District Court determined that both the allegation of an extra-judicial conspiracy in this case along with the plaintiff's inability to conduct discovery of this issue precluded the dismissal of the

action against Officer Buonora. (App. 33a-34a; 17a-18a.)

By allowing for an "extra-judicial conspiracy" exception to absolute immunity afforded to witnesses in judicial proceedings, the Second Circuit has created an exception where none was intended. The reasoning of the Court of Appeals for the Eighth Circuit amply demonstrates that the Second Circuit's decisions creating an "extra-judicial conspiracy" exception to the *Briscoe* rule conflicts with this Court's holding.

> Exceptions to absolute immunity should not be created freely. That malicious or corrupt acts are protected, *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967), indicates how solidly the doctrine of absolute immunity is entrenched in our legal system. To defeat this doctrine by pleading a conspiracy would be to create an exception where none was intended.

*Moses v. Parwatikar, M.D.*, 813 F.2d 891, 893 (8th Cir. 1987).

Likewise, the Tenth Circuit held that to allow for an "extra-judicial conspiracy" exception would create the same problems that this Court sought to alleviate with its *Briscoe* holding.

> Allowing criminal defendants to seek damages under § 1983 for *conspiracy* among state witnesses to offer false testimony would give

> rise to the same systemic concerns noted in *Briscoe*. Instead of suing state witnesses for perjured testimony, a defendant could simply transform the perjury complaint into an allegation of a conspiracy to do the same. Moreover, an extension of *Briscoe* prevents self-censorship on the part of witnesses due to the fear of civil liability. *Id.* 460 U.S. at 333, 103 S.Ct. at 1114.

*Miller v. Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991) (Emphasis in original.)[3]

[3] In its January 28, 2010, Summary Order, the Second Circuit stated: "In this Circuit, however, absolute immunity does not extend to allegations of conspiracy to present false testimony. *See Dory v. Ryan*, 25 F.3d 81, 84 (2nd Cir.1994); *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246, 255 (2nd Cir.1984). Although Buonora asks that we overrule these precedents, this panel is bound by those decisions." (App. 3a.) The panel thereby stated that it could not overrule the Court's earlier decisions. Significantly, however, given the opportunity to indicate its agreement with those earlier decisions, it chose not to.

II.

## EACH OF THE OTHER SEVEN (7) CIRCUIT COURTS OF APPEALS TO CONSIDER THIS ISSUE HAS REJECTED THE SECOND CIRCUIT'S "EXTRA-JUDICIAL CONSPIRACY EXCEPTION" AND HAS HELD THAT WITNESSES ARE ENTITLED TO ABSOLUTE IMMUNITY UNDER §§ 1981 AND 1983 BOTH FROM THEIR TESTIMONY AND FROM ANY CONSPIRACY TO COMMIT PERJURY AND, THEREFORE, COMPELLING REASONS EXIST TO GRANT THIS PETITION.

With the exception of the Second Circuit, the totality of the Circuit Courts of Appeals that have considered this issue have held that a witness is entitled to the *Briscoe* grant of absolute immunity from liability from both the witness' testimony and from any conspiracy to commit perjury. *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993); *Alioto v. City of Shively, Kentucky*, 835 F.2d 1173 (6th Cir. 1987); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989); *Moses v. Parwatikar, M.D.*, 813 F.2d 891, 893 (8th Cir. 1987); *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir., *en banc*, 1986); *see, too, Franklin v. Terr*, 201 F.3d 1098 (9th Cir. 2000); *Miller v. Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991); *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999).

In *Alioto*, the plaintiff had alleged that the defendants had conspired to lie and had lied to a grand jury which subsequently indicted him.

Upholding the District Court's dismissal of plaintiff's 1983 claims based upon the allegations of false testimony and conspiracy to provide false testimony, the Sixth Circuit held that, "[t]he doctrine enunciated in *Briscoe v. LaHue* also shields from liability alleged conspiracies to give false and incomplete testimony in judicial proceedings." *Alioto*, 835 F.2d at 1174 (citation omitted).

When faced with claims of perjured testimony and a conspiracy to commit perjury by an Illinois Police Officer, the Seventh Circuit likewise upheld the District Court's dismissal of the plaintiff's action. Judge Posner, writing the opinion of the Court, held, "[w]itnesses do have absolute immunity, and Wilkins's [plaintiff] attempt to circumvent it by charging them with conspiracy is facile and must fail." *Wilkins v. May*, 872 F.2d 190, 192 (7th Cir. 1989).

The Eighth Circuit, in *Moses v. Parwatikar, M.D.*, 813 F.2d 891 (8th Cir. 1987), was asked to overturn the dismissal of an action brought by a criminal defendant against a Court-appointed psychiatrist who had determined that the defendant was competent to stand trial. The plaintiff had alleged that the doctor had conspired with prosecutors to deny him a fair examination. The Court, having the benefit of reviewing the decisions of three other Circuit Courts of Appeals, including an *en banc* decision from the Ninth Circuit which reversed that Circuit's prior holding that a conspiracy was outside the absolute immunity granted to witnesses, held as follows:

> ...in *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) the Ninth Circuit in its *en banc* procedure reconsidered its earlier position and unanimously held that pleading a conspiracy does not affect absolute immunity. We agree with this sound principle. Exceptions to absolute immunity should not be created freely. That malicious or corrupt acts are protected, *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967), indicates how solidly the doctrine of absolute immunity is entrenched in our legal system. To defeat this doctrine by pleading a conspiracy would be to create an exception where none was intended.

813 F.2d at 893; (See, also, *Miller*, 948 F.2d at 1570-1571.)

In *Miller*, the Tenth Circuit examined the legislative history of the Civil Rights Act of 1871 and found nothing "suggesting that Congress intended to provide a cause of action for conspiracy to commit perjury in order to obtain a criminal conviction". With respect to vexatious litigation, that Court held:

> Allowing criminal defendants to seek damages under § 1983 for *conspiracy* among state witnesses to offer false testimony would give rise to the same systemic concerns noted in *Briscoe*. Instead of suing state witnesses for perjured testimony, a defendant could simply transform the perjury complaint into an allegation of a conspiracy to do the same.

> Moreover, an extension of *Briscoe* prevents self-censorship on the part of witnesses due to the fear of civil liability. *Id.*, 460 U.S. at 333, 103 S.Ct. at 1114.

*Miller v. Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991) (Emphasis in original).

In the instant action, Officer Buonora committed perjury, was subsequently indicted, and plead guilty to perjury as a misdemeanor. In *Miller*, the Tenth Circuit indicated, "[o]ur holding does not change the fact that such conspirators may be liable *criminally* for conspiring to procure perjured testimony." 948 F.2d at 1571 [emphasis in original].

Several of the Circuit Courts of Appeals have ruled on this issue subsequent to the decisions rendered by the Second Circuit. *Franklin v. Terr*, 201 F.3d 1098, 1101 (9th Cir. 2000); *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999); *House v. Belford*, 956 F.2d 711 (7th Cir. 1992). Each of these Circuit Courts of Appeals analyzed the holdings of the Second Circuit and found them to run counter to the Supreme Court's decision in *Briscoe*.

When confronted with this issue, the Ninth Circuit had the benefit of being able to review the decisions of six Circuit Courts of Appeals each of which have held that the *Briscoe* grant of absolute immunity extends to allegations of conspiracy to commit perjury as well as the holdings of the Second Circuit in *San Filippo, supra,* and *Dory, supra*. The Ninth Circuit was "persuaded that allowing a

plaintiff to circumvent the *Briscoe* rule by alleging a conspiracy to present false testimony would undermine the purposes served by granting witnesses absolute immunity from damages under § 1983." *Franklin*, 201 F.3d at 1101. The Court stated, "the district court correctly observed, '[a]ny other holding would eviscerate absolute immunity since a witness rarely prepares her testimony on her own'". 201 F.3d at 1101-1102.

Much like the allegations in the instant case, the plaintiff in *Franklin* alleged that the defendant conspired with another witness to offer perjured testimony and ensure that both witnesses told the same story. The Court noted, "[t]he ostensible purpose of this conspiracy was to ensure that one person's testimony did not contradict the other's testimony. But because Terr's alleged conspiratorial behavior is inextricably tied to her testimony, we find that she is immune from damages." 201 F.3d at 1102.

The Eleventh Circuit in *Jones, supra*, concurred with the Seventh Circuit that:

> "'the Second Circuit's effort to differentiate between a conspiracy to present perjured testimony and the act of presenting perjured testimony is a distinction without a difference. A person may not be prosecuted for conspiring to commit an act that he may perform with impunity.' *House*, 956 F.2d at 720".

*Jones*, 174 F.3d at 1289.

With respect to a similar issue in the same action, the alleged subornation of perjured testimony, the Eleventh Circuit held:

> To allow a § 1983 claim based on subornation of perjured testimony where the allegedly perjured testimony itself is cloaked in absolute immunity would be to permit through the back door what is prohibited through the front.

*Jones*, 174 F.3d at 1289.

Coggins has alleged that Officer Buonora conspired with co-defendant Officer Vara to violate respondent's civil rights. He alleges that (1) Buonora and Vara provided false testimony before the Grand Jury; (2) Vara and Buonora provided mutually consistent testimony; and (3) Buonora plead guilty to perjury. The conspiratorial conduct complained of by Coggins, specifically the conspiracy between Officer Buonora and Officer Vara, is inexorably tied to Officer Buonora's perjured testimony.

Without the "extra-judicial conspiracy exception" to the *Briscoe* grant of absolute immunity, these allegations fail to raise a claim upon which relief may be granted. *Briscoe v. LaHue*, 460 U.S. 325 (1983). The "extra-judicial conspiracy exception" to the *Briscoe* rule created by the Second Circuit in *San Filippo, supra,* and applied to police officer witnesses in *Dory, supra,* creates a back door to the liability of witnesses for their testimony before a Grand Jury that was not envisioned by the Supreme Court in *Briscoe*. The remedy for Officer Buonora's perjury is

not civil liability under 42 U.S.C. § 1983, but rather criminal prosecution for perjury. Such a remedy has already been achieved by Officer Buonora's prosecution and plea of guilty to the charge of perjury.

Of course, this Court's Rule 10 (a) demonstrates that a "compelling reason[ ]" for granting a Petition for a Writ of Certiorari may lie in the existence of the actions by a United States Court of Appeals in "enter[ing] a decision in conflict with the decision of another United States court of appeals on the same important matter". In this case, the "compelling reasons" for such a grant are underscored by the very fact that seven (7) Circuit Courts of Appeals have repudiated the Second Circuit's rationale and reasoning. In other words, the Second Circuit's holdings do not merely conflict with the decisions of "another" Circuit, but every other Circuit to have considered this issue.

## III.

## POLICE OFFICER CRAIG BUONORA IS ENTITLED TO RESOLUTION OF THE ABSOLUTE IMMUNITY QUESTION AT THE EARLIEST POSSIBLE STAGE IN LITIGATION.

In *Pearson v. Callahan*, 555 US ---, 129 S. Ct. 808, 815, 172 L. Ed. 2d 56 (2009), a unanimous Supreme Court "stressed the importance of resolving immunity questions at the earliest possible stage in litigation" (citing *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536 (1991) (*per curiam*)). Moreover, Officer Buonora is entitled to absolute immunity not

just as a defense but from suit itself. *Mitchell v. Forsyth*, 472 U.S. 511, 512, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (holding that "immunity from suit... is effectively lost if a case is erroneously permitted to go to trial.").[1]

> [A] ruling on [immunity] should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is "an entitlement not to stand trial or *face the other burdens of litigation*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) [emphasis added]. The privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Ibid.* As a result, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

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[1] A denial of immunity, whether it be qualified or absolute, is an appealable order. *Ashcroft v. Iqbal*, 556 U.S. ---, ---, 129 S.Ct. 1937, 1945 (2009) (*citing*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). The Supreme Court in *Iqbal* endorsed the well established notion that denials of immunity fall within a class of prejudgment orders that are reviewable under the collateral-order doctrine because an order rejecting qualified immunity at the motion-to-dismiss stage is a "final decision" under 28 U.S.C. § 1291, which vests courts of appeals with "jurisdiction of appeals from all final decisions of the district courts." *Id.* at 1946.

*Saucier v. Katz*, 533 U.S. 194, 200-201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (emphasis in original).

This desire to resolve immunity questions at the earliest possible stage was reiterated even more recently in *Ashcroft v. Iqbal*, 556 U.S. ---, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009), where this Court reversed the Second Circuit's denial of a motion to dismiss on qualified immunity grounds, reasoning that "the basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, *including 'avoidance of disruptive discovery.' Siegert v. Gilley*, 500 U.S. 226, 236, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)...." *Id.* at 1953 (emphasis added).

The Supreme Court in *Iqbal* noted Judge Cabranes' identification of "the uneasy compromise... between a qualified immunity privilege... and the pleading requirements of Rule 8 (a)...." *Id.* at 1945 (*quoting*, *Iqbal v. Hasty*, 490 F.3d 143, 178 (2nd Cir. 2007)). Judge Cabranes "urged this Court to address [the pleading standard] 'at the earliest opportunity.'" *Ibid.* This Court took up Judge Cabranes' suggestion and, among other things, then rejected "the careful-case-management approach" stating:

> We decline... to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context where we are impelled to give real content to the concept of qualified immunity.... Because

> respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

*Id.* at 1953-54. This Court dismissed Plaintiff's Complaint *prior to discovery.*[5]

Police Officer Buonora brings a stronger claim for resolution than those who sought only qualified immunity in *Ashcroft v. Iqbal*, 556 U.S. ---, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), *Pearson v. Callahan*, 555 U.S. ---, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009), *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), and *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), as well as others who claimed only qualified immunity. Officer Buonora claims absolute immunity from suit based upon claims that arose out of his testimony in a judicial proceeding, which occurred in the course of his official capacity. *Briscoe*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96. *See*, *Shmueli v. The City of New York*, 424 F.3d 231, 236 (2nd Cir. 2005)("As the existence of absolute immunity protects an official not

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[5] *Iqbal* makes clear the District Court erroneously assumed as true many legal conclusions and "threadbare recitals" alleged in the Respondent's complaint when the court considered the Petitioner's 12 (b) (6) motion to dismiss. 556 U.S. ---, 129 S.Ct. at 1950. Yet, the sufficiency of the Respondent's complaint is squarely before this Court because that question is inextricably linked to whether the Respondent is entitled to discovery in light of Petitioner's absolute immunity. As the Court observed in *Iqbal*, "[r]ule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions" *Ibid.*

only from liability but also from suit, the validity of the defense should be determined at an early stage.").

Accordingly, Officer Buonora is entitled to this determination at the earliest possible stage, especially where the District Court was presented with ample, admissible evidence, which was undisputed, to determine these issues.

## IV.

## THE DISTRICT COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT WAS PREMATURE AND THAT THE RESPONDENT'S AFFIDAVITS COMPLIED WITH RULE 56 (f). MOREOVER, THE CIRCUIT COURT WAS REQUIRED TO CONSIDER THESE ISSUES *DE NOVO.*

Summary judgment should be granted when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Concepcion v. U.S.*, 298 F. Supp.2d 351, 355 (Dist. Ct., E.D.N.Y. 2004) (*citing*, FRCP 56 (c); *see also, Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *TransSport, Inc., v. Starter Sportswear, Inc.*, 964 F.2d 186, 188 (2nd Cir. 1992) (*citing*, *Bryant v. Maffucci*, 923 F.2d 979, 982 (2nd Cir. 1991).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Concepcion v. U.S.*, 298 F. Supp.2d 351

(E.D.N.Y. 2004) (*citing*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). But, "[o]nce the moving party has met this burden, the non-moving party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Concepcion v. U.S.*, 298 F.Supp.2d at 355 (*quoting*, FRCP 56 (e)).

On a summary judgment motion, "[a] district court properly considers only evidence that would be admissible at trial." *Atlantic Specialty Insur. Co. v. Gold Coast Developments, Inc.*, 2008 WL 974411 (Dist. Ct., E.D.N.Y 2008) (Bianco, J.) (*citing*, *Nora Bevs., Inc. V. Perrier Group of America, Inc.*, 164 F.3d 736, 746 (2nd Cir. 1998)). Yet, in the instant matter, the District Court only considered "the complaint in this case and Coggin's Rule 56 (f) affidavit [to conclude] that Buonora's motion for summary judgment is premature," and it never considered the admissible evidence, which the Petitioner offered in support of his motion for summary judgment.

The Circuit Court was required to review *de novo* the denial of summary judgment when based on assertions of absolute and/or qualified immunity. *See*, *Walczyk v. Rio*, 496 F.3d 139, 153 (2nd Cir. 2007); *See also*, *Thomas v. Roach*, 165 F.3d 137 (2nd Cir. 1999) (The Second Circuit reviewed *de novo* a grant of summary judgment and affirmed the lower court's grant of summary judgment dismissing the plaintiff's complaint against defendant police officers *before, and in the absence of, discovery*). The Second Circuit in *Roach* held that a plaintiff

> must allege [a conspiracy], with at least some degree of particularity, overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy. [The plaintiff] has not alleged with any particularity the overt acts engaged in by the police officers. Instead, Thomas's assertions were conclusory and vague, and did not establish the existence of an agreement among the defendants to deprive Thomas of his constitutional rights. Summary judgment was therefore appropriate.

165 F.3d 137, at 147 (citations omitted).

The District Court apparently has misunderstood from the start that the Petitioner's motion for summary judgment was properly before it. There was no request for, or denial of, conversion of a Rule 12 (b) (6) motion to a Rule 56 motion. Rather, the Petitioner sought, and received, the District Court's permission to make the Rule 56 motion for summary judgment to dismiss the Respondent's complaint based upon absolute immunity and other grounds. (App. 6a.)

Further, the Petitioner set before the District Court a prima *facie* case *entitling* the Petitioner to summary judgment based upon absolute immunity from suit arising out of his testimony before the Grand Jury, pursuant to *Briscoe*. The Petitioner also set forth a *prima facie* case establishing as a matter of law that he is not a complaining witness, based upon *Malley*. And, the Respondent did not dispute any of

the factual assertions related to Officer Buonora's claim of absolute witness immunity.

The failure to dispute the facts relevant to the issue of absolute witness immunity are to be considered by the Court to be "admissions" under FRCP 56 (e). "If undisputed material facts are properly placed before the court by the moving party, those facts will be deemed admitted, unless they are properly controverted...." *E.E.O.C. v. Wal-Mart Stores, Inc.*, 2001 WL 1725300 at *3 (Dist. Ct., W.D.N.Y. 2001) (*quoting*, *Glazer v. Formica Corp.*, 964 F.2d 149, 154 (2nd Cir. 1992).

The Respondent offered no evidence in opposition to the summary judgment motion but for a deficient FRCP 56 (f) affidavit[6], and the District Court both abused its discretion and erred in finding that the Respondent's Rule 56 (f) affidavit "wholly complie[d] with the standard the Second Circuit has set forth...." (App. 16a.) Specifically, the District Court arbitrarily concluded that four (4) paragraphs from the Respondent's FRCP 56 (f) affidavit created a genuine issue of material fact. (App. 15a-16a; 66a-67a.) Yet, nowhere in the Respondent's FRCP 56 (f) affidavit does he state where, or from whom, he hopes to obtain the necessary information to establish that Officer Buonora was a complaining witness and, thus, subject to the *Malley* exception to absolute immunity from suit or, for that matter, had engaged

[6] In addition to their FRCP 56 (f) affidavit, Coggins also provided the court below with a Local Rules of the United States District Court for the Southern and Eastern Districts of New York, Civil Rule 56.1 Affidavit. For brevity purposes, we are treating the two Affidavits together.

in an extra-judicial conspiracy. (App. 64a-67a.)

FRCP 56 (f) requires "what facts are sought and how they are to be obtained...." The District Court abused its discretion in concluding that summary judgment was premature in light of the erroneous credit given to Respondent's faulty FRCP 56 (f) affidavit. (App. 17a-18a; 65a-68a.)

Petitioner's appeal placed before the Second Circuit anew all the legal (and procedural) questions raised by the Order below, including Petitioner's entitlement to absolute immunity from suit based upon *Briscoe*; that an extra-judicial conspiracy exception is an assault on *Briscoe*; that he is not a complaining witness as a matter of law; that the Respondent failed to meet the test required by Rule 56 (f) to sustain a conspiracy claim or, for that matter, to adequately and sufficiently plead an extra-judicial conspiracy and that the Petitioner is entitled to summary judgment based upon the undisputed, admissible evidence presented to the court below, which the District Court erroneously failed to consider.

In other words, the denial of Petitioner's motion for summary judgment raised before the Circuit Court *de novo* the District Court's entire memorandum and decision. *De novo* review entails "study[ing] the reasoning on which [the District Court's decision] is based." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163 at 168 (2nd Cir. 2001). Since the District Court evaluated the Respondent's Complaint under 12 (b) (6), this "reasoning" was

squarely before the Second Circuit when reviewing the Petitioner's entitlement to absolute immunity *de novo*. *See*, *Walczyk*, 496 F.3d at 153; *Thomas v. Roach*, 165 F.3d at 142.

While summary judgment is generally improper prior to discovery, *Hellstrom, M.D., v. U.S. Dep't of Veteran Affairs*, 201 F.3d 94 (2nd Cir. 2000), the Second Circuit acknowledged that "in rare instances" summary judgment may be granted even without discovery. *Sutera v. Schering Corp.*, 73 F.3d 13 (2nd Cir. 1995). Summary judgment is appropriate when there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). This is just such a case.

The Respondent was required to come forward with evidence to oppose the Petitioner's motion for summary judgment. The Respondent's only offer of proof was a deficient Rule 56 (f) affidavit, as aforesaid. As a result, the District Court incorrectly[7] concluded that "plaintiff has alleged facts adequate to invoke the extra-judicial conspiracy exception and defeat Buonora's claim of absolute immunity at this stage...." (App. 29a.) Rather, the only actual facts before the trial court to infer a conspiracy was that "(1) Buonora and Vara provided false testimony before the grand jury...; (2) Vara and Buonora provided mutually consistent testimony...; and (3)

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[7] *See*, *Ashcroft v. Iqbal*, 556 US ---, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009) (This Court stated "we are not bound to accept as true a legal conclusion couched as a factual allegation" when considering whether a complaint states a claim to relief).

Buonora, in fact, pleaded guilty to perjury..." (App. 29a.) These findings would purport to hold Officer Buonora liable based upon the mere fact that he testified before a grand jury, which is clearly not what *Briscoe* had in mind.

Finally, despite the fact that there is not a scintilla of evidence, either express or implied, of an actual conspiracy, the District Court concluded "that plaintiff has alleged adequate facts to invoke the extra-judicial conspiracy exception and defeat Buonora's claim of absolute immunity." (App. 29a.) This is also inconsistent with the declaration in *Iqbal* that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not 'show[n]' -- 'that the pleader is entitled to relief.'" 129 S. Ct. at 1950 (*quoting*, FRCP 8 (a) (2)).

Officer Buonora is entitled to this absolute immunity since he was not a "complaining" witness and his only role in the prosecution of the plaintiff was his false testimony before the Grand Jury considering criminal charges against the plaintiff.

As demonstrated in our preceding points, Coggins alleges that Officer Buonora and others conspired to commit perjury. While the Second Circuit has previously held that an allegation of conspiracy within the plaintiff's complaint is sufficient to deny a motion for dismissal based upon a claim of absolute immunity, each of the Circuit Courts of Appeals (the First, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits) to examine this

issue has ruled to the contrary. Accordingly, this Court should grant the Petition and, upon review, reverse the ruling of the Second Circuit and hold that an allegation of conspiracy is insufficient to defeat Officer Buonora's entitlement to absolute immunity.

Moreover, Officer Buonora is entitled to absolute immunity from respondent's claims as he was not a "complaining witness" in the prosecution of the plaintiff. His only role, other than assisting Officer Vara at the scene, was to testify, albeit falsely, before the Grand Jury that considered criminal charges against the plaintiff. As a witness testifying before a Grand Jury, Officer Buonora is entitled to absolute immunity, both as a defense and from suit, from the plaintiff's claims.

**Wherefore**, this Petition should be granted pursuant to this Court's Rule 10 (a) since there are "compelling reasons" for doing so grounded in the fact that the Second Circuit's creation of an "extra-judicial conspiracy exception" to *Briscoe v. LaHue* conflicts not only with this Court's holding but with the decisions of all seven (7) Circuit Courts of Appeals which have considered this issue and have rejected the Second Circuit's holdings and rationale, together with such other and further relief as this court deems just and proper.

Respectfully Submitted

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